STATE OF MICHIGAN

COURT OF APPEALS

DARREL MEHAY, ANN MEHAY and JOSHUA MEHAY,

Plaintiffs-Appellees,

v

RUBEN GARZA,

Defendant-Appellant,

and

DEPARTMENT OF TRANSPORTATION,

Defendant.

UNPUBLISHED
October 10, 2017

No. 333818
Court of Claims
LC No. 14-000162-MZ

Before: GLEICHER, P.J., and FORT HOOD and SWARTZLE, JJ.

PER CURIAM.

Defendant Ruben Garza appeals as of right from the trial court's order denying his motion for summary disposition on the basis of governmental immunity.[1] We affirm.

This appeal arises from a motor vehicle accident that took place on December 21, 2013 on I-75 near Birch Run, Michigan when Garza, an employee of the Michigan Department of Transportation (MDOT), operating a tow plow, struck the vehicles that Darrel Mehay, Ann Mehay and Joshua Mehay were travelling in. On appeal, Garza argues that the trial court erred in denying his motion for summary disposition pursuant to MCR 2.116(C)(7) where the record confirms that he was not grossly negligent in causing the collision leading to this appeal and where he is therefore immune from tort liability. We disagree.

In *Bellinger v Kram*, ___ Mich App ___, ___; ___ NW2d ___ (2017) (Docket No. 331199); slip op at 3, this Court recently set forth the applicable standard for reviewing a trial

[1] We acknowledge that plaintiff Ann Mehay's claims in this action were dismissed by way of a stipulation and order entered in the trial court.

court's decision regarding a motion for summary disposition where governmental immunity is at issue:

> We review the trial court's denial of defendant's motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must review the facts in the complaint to determine if they "justify a finding that recovery in tort is not barred by governmental immunity." *Harrison v Dir of Dep't of Corrections*, 194 Mich App 446, 449; 487 NW2d 799 (1992). All evidence that is submitted by the parties must be construed in favor of the nonmoving party to determine whether there exists a genuine issue of material fact. *Skinner v Square D Co*, 445 Mich 153, 161–162; 516 NW2d 475 (1994). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Michigan's Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*., "broadly shields government agencies from tort liability and grants immunity to those agencies. The statutory exceptions are narrowly construed." *Denney v Kent Co Rd Comm'n*, 317 Mich App 727, 732; 896 NW2d 808 (2016). In *Costa v Community Emergency Med Servs*, 475 Mich 403, 410; 716 NW2d 236 (2006), the Michigan Supreme Court recognized:

> [G]overnmental immunity legislation "evidences a clear legislative judgment that public and private tortfeasors should be treated differently." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000) (citation omitted). We have also observed that a "central purpose" of governmental immunity is "to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity." *Mack v Detroit*, 467 Mich 186, 203 n 18; 649 NW2d 47 (2002).

MCL 691.1407(2) is the relevant statutory authority providing immunity from tort liability for employees of a governmental agency. This statute provides, in pertinent part, as follows:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) *The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage*. [Emphasis added.][2]

MCL 691.1407(8)(a) further defines gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

Recently, in *Ray v Swager*, ___ Mich ___, ___; ___ NW2d ___ (2017) (Docket No. 152723); slip op at 27, the Michigan Supreme Court noted that the exception set forth in MCL 691.1407(2) creating immunity from tort liability for employees of a governmental agency is a "narrow" one. Therefore, gross negligence, as contemplated by the plain language of the statute, encompasses "situations in which the contested conduct was substantially more than negligent." *Costa*, 475 Mich at 411. See also *Maiden*, 461 Mich at 121 (stating that the plain language of MCL 691.1407(2) limits tort liability for governmental employees to "situations where the contested conduct was substantially more than negligent.") Likewise, in *Bellinger*, ___ Mich App at ___; slip op at 4, this Court recognized the well-settled legal principle that gross negligence requires a "willful disregard of safety measures and a singular disregard for substantial risks." (Citation and internal quotation marks omitted.) As a general matter, the fact that a defendant could have undertaken more precautions will not support a conclusion that the defendant was grossly negligent. *Id*. at ___; slip op at 4.

While not factually on point, this Court's recent analysis in *Bellinger* is of guidance in the instant appeal. In *Bellinger*, this Court concluded that the trial court properly denied the defendant's motion for summary disposition on the basis of governmental immunity where the record evidence supported a finding that the defendant, a school teacher, acted in a manner demonstrating a "willful disregard of safety measures and substantial disregard for known risks." *Id*. at ___; slip op at 4. In that case, the defendant taught a woodshop class and the plaintiff was one of her students. During her deposition, the plaintiff testified that the defendant "actively encouraged" students in the class not to use a safety guard while using a table saw, stating that it was not congruent with how such equipment would be utilized in "real life[.]" *Id*. at __; slip op at 2. The plaintiff further testified that the defendant told the students that such safety equipment was used only when insurance companies attended for safety inspections. *Id*. The defendant did not dispute that she removed the guard at issue from the table saw, and that she told the students that they could safely operate the table saw without the guard, and that only a push stick and push block were required. *Id*. The plaintiff was injured after the defendant repeatedly asked her to assist another student to make an angled cut on the table saw, a maneuver that the plaintiff had not undertaken before. *Id*.

In concluding that summary disposition was properly denied, this Court noted that the plaintiff's expert witness stated that even an expert operator should not operate the table saw

[2] Subsections (a) and (b) of MCL 691.1407(2) are not at issue in this appeal.

without a blade guard, and the safety devices the defendant was using were not sufficient to protect from injury. *Id*. at __; slip op at 4. Where the defendant did not present any evidence to counter the plaintiff's expert witness's conclusions, and where the record evidence supported a finding that the defendant "pressured" the plaintiff to engage in a dangerous maneuver without adequate safety protection, "instilling in [the] plaintiff the false belief that she was not in danger[,]" this Court stated, "[t]his is evidence of a willful disregard for safety measures and a substantial disregard for known risks." *Id*. Of particular import to the *Bellinger* Court's decision was the fact that the defendant had engaged in a cover up of her actions, where, for example, the defendant blamed the plaintiff in incident reports completed after the accident and stated that she had told the plaintiff never to use the table saw without the safety guard. *Id*. at __; slip op at 5. Where a jury could infer that the defendant had "guilty knowledge," this was one factor the *Bellinger* Court considered in affirming the trial court's denial of summary disposition sought pursuant to MCR 2.116(C)(7) on the basis of governmental immunity. *Id*.

Thus, the dispositive inquiry for us is whether the record evidence could support a fact-finder's determination that Garza was grossly negligent. To make this judgment, we must determine whether there is record evidence to support a conclusion that Garza willfully disregarded appropriate safety measures and acted with a disregard for substantial risks in operating the MDOT vehicle. *Bellinger*, ___ Mich App at ___; slip op at 4. In the trial court, as on appeal, plaintiffs contend that factual disputes with regard to Garza's gross negligence exist where Garza stated, in a December 27, 2013 incident report, that he could not see the tow plow behind his MDOT vehicle when he passed the Mehays, and where he conceded during his deposition that the accidents took place because the tow plow was not fully retracted behind his vehicle. Plaintiffs also note that Garza conceded during his deposition that he was at fault for causing the accident. Plaintiffs also point out that according to their deposition testimony, they were travelling in the range of 35 to 45 miles an hour, a rate of speed that would not have impacted Garza's ability to effectively clear the roadway of I-75. Plaintiffs also assert that for Garza to push waves of water onto their vehicles before the collisions, he must have been travelling faster than the 10 to 15 miles an hour he claimed in his deposition that he was travelling**.** Plaintiffs also argue that when Garza did pass the Mehays, he simply assumed that the tow plow was fully retracted, without knowing for certain that it was.

Our close review of the record reflects that at a minimum, Garza was uncertain whether the two plow was safely retracted in full behind his vehicle before he attempted to pass the Mehays in icy conditions, stating that he "figured" it was. Specifically, Garza noted that he started to pass the Mehay vehicles before the tow plow was fully retracted. Notably, as he passed Darrel Mehay's van, the tow plow was still in the process of being retracted. Moreover, when Garza collided with both Darrel and Joshua Mehay's vehicles, he was unsure of what had even led to the collisions. It is also worthy of note that Garza had previously been trained on retracting the tow plow at a speed of 35 miles an hour, not the 20 miles an hour he was driving as he passed the Mehay vehicles. Also, as plaintiffs aptly point out, Garza conceded during his deposition that these collisions occurred because he did not properly retract the tow plow. Thus, the record evidence, viewed in the light most favorable to plaintiffs, yields factual disputes with regard to whether Garza's actions reflected a willful disregard of safety measures and a disregard for substantial risks to others, and therefore rose to the level of gross negligence as contemplated by MCL 691.1407(8)(a). *Bellinger*, ___ Mich App at ___; slip op at 3, 4. Put another way, we agree with the trial court that the present case is one, where on the basis of the record evidence,

jurors could reach varying conclusions with regard to whether Garza was grossly negligent. See *Kendricks v Rehfield*, 270 Mich App 679, 682; 716 NW2d 623 (2006) (recognizing that summary disposition "is precluded where reasonable jurors honestly could have reached different conclusions with respect to whether a defendant's conduct amounted to gross negligence") (citation and internal quotation marks omitted).

In his brief on appeal, Garza claims that the record evidence does not support a conclusion that his decision to pass the Mehays was grossly negligent, particularly where he was not motivated by impatience. Instead, Garza claims that he decided to pass the Mehay vehicles because he was concerned about his ability to safely clear the roadway of I-75 for the benefit of all motorists. Notably, Garza was concerned that he was not able to clear snow effectively while travelling behind the Mehays and this was creating a hazardous situation for all motorists. Garza also claims that the record evidence confirms that he did indeed look back to see if the tow plow had retracted before he passed the Mehays, that he was operating the tow plow under severe weather conditions that impeded visibility, and that his low speed at the time of the collisions impacted his ability to retract the tow plow in a safe fashion. Garza also alleges that his speed of travel that evening was immaterial, where it was his "failure to retract the tow plow properly[,]" and not his speed, that led to the collisions. While the record does contain evidence to support Garza's claims, where there is also record evidence that supports a finding that he acted with a "willful disregard of safety measures and a singular disregard for substantial risks[,]" the trial court properly denied Garza's motion for summary disposition. *Bellinger*, ___ Mich App at ___; slip op at 4.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Karen M. Fort Hood
/s/ Brock A. Swartzle